In the Supreme Court of the United States

OCTOBER TERM 1940.

No.....

COURT OF APPEALS NOS. 8421 AND 8422.

MARVIN L. GARDNER,
Trustee in Bankruptcy of Arthur George Doethlaff,
Bankrupt,
Petitioner,

vs.

ARTHUR GEORGE DOETHLAFF,
Bankrupt,
and
THE PENN MUTUAL LIFE INSURANCE COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

(Italics ours.)

OPINIONS OF THE LOWER TRIBUNALS.

The opinion and order of the Referee in Bankruptcy is printed in the Record, pp. 23, 24, 25, 26, 27, 28.

The order of the District Court of the United States is printed in the Record, p. 29.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is attached to the record of the proceedings in the Circuit Court of Appeals for the Sixth Circuit. Also it appears in 117 Fed. 2nd 582.

STATEMENT OF THE CASE.

This case was presented in the lower tribunals on an agreed statement of facts. A summary statement of these facts is given herein, *ante,* in connection with the Petition for a Writ of Certiorari, *ante,* page 2.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Sixth Circuit erred in each of the following particulars:

1. In hearing, passing upon and reversing the decisions of the two lower tribunals, when the said court had *no jurisdiction whatever* over either of the appeals.

2. In failing *to search for* and apply the *law of Ohio,* which clearly supports the findings of the two lower tribunals, in *entire disregard* of the mandates of this Court in:

Erie Railroad Company v. Harry J. Tompkins (1938) 304 U. S. 64;

John G. Ruhlin et al. v. New York Life Insurance Company (1938) 304 U. S. 202;

West v. American Telephone & Telegraph Company (1940) 311 U. S. 223.

3. In holding that the changed *beneficiaries* in the insurance "had a *vital interest*" in the policy, and "should have been *made parties* defendant," both of which propositions are *contrary to established law in Ohio.*

4. In its construction of Ohio General Code, Section 9394, changing by interpretation "*paid in fraud* of creditors" to "*paid with intent* to delay, hinder and defraud them."

5. In holding that the District Court "was unauthorized to direct the premiums to be turned over out of the *cash surrender value* of the policy," when *no such order was made* by either the District Court or the Referee in Bankruptcy.

6. In holding that the lower tribunals were in error in ordering the "premiums, accumulated dividends and interest to be turned over" to the trustee, when, by the terms of the policy "all privileges of ownership, prior to maturity, were vested only in the Insured," and the Bankruptcy Act, then and now, vest in the Trustee "*powers* which he (the bankrupt) might have exercised for his own benefit."

7. In holding that "we are dealing with an *exemption statute*" which is entitled to a "*construction liberal* to the debtor," Ohio has stated by statute, and by a decision of the Supreme Court of Ohio, quoted *post*, that "exemption shall not be made by the debtor, or allowed to him from *money* * * * *due to him* * * * *from any corporation.*" The statute and decision of Ohio were called to the attention of the court by brief and argument, but they were entirely passed over in the Court's opinion.

8. In failing to hold that the sum of $113.35 (it having been paid to the Insurance Company on June 8, 1937, and the adjudication in bankruptcy having been made on September 3, 1937), belonged to the trustee under the terms of the Bankruptcy Act.

ARGUMENT ON ERRORS ASSIGNED.

1. THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT HAD NO JURISDICTION IN EITHER OF THESE APPEALS.

There were two separate appeals before the Circuit Court of Appeals in these cases. Case No. 8421 was the appeal of the Bankrupt, and Case No. 8422 was the separate appeal of the Insurance Company. The petitioner herein filed, in each case, a motion to dismiss the appeal on grounds hereinafter set forth. Although each of these motions to dismiss were accompanied by briefs in support thereof, the court postponed passing on these motions until the oral hearing of the appeals.

At the oral hearing at one session, the court heard argument on both of the appeals and on both of the motions to dismiss the appeals, and the court covered both of the appeals and both of the motions in one opinion, said opinion being printed, 117 Fed. 2nd 582, and also attached to the record as hereinbefore indicated.

The motion to dismiss the *appeal of the Bankrupt* (Case No. 8421) was based upon the fact that the so-called appeal was neither filed nor docketed in the Circuit Court of Appeals within the time required by law. In fact, it was not until *after* the time *limited* by law for perfecting an appeal to said Court, that the attorney for the bankrupt filed in said Court, an "Application to Appeal in Forma Pauperis," and said application was not acted on by said Court until October 10th, 1939. All of which matters were duly set forth in the Trustee's Motion to dismiss the appeal of the bankrupt, from which we excerpt the following statements:

> "Notice of appeal was filed June 1st, 1939. Thus, the case should have been docketed within forty (40) days from date of notice of appeal, namely, by *July 11th, 1939* (Rule 73 (g) of Civil Procedure). Rule 18 (United States Circuit Court of Appeals of the Sixth Circuit) provides that at time of filing the record the appellant shall deposit with the Clerk of Courts the sum of $45.00 as security for costs, except in certain cases, upon proper showing. But no costs were deposited in this case within the forty day period and no action was taken nor any Motion filed by the Appellant until *August 17th, 1939* (some five weeks later), when a Motion was filed by the appellant to prosecute an appeal in forma pauperis. This rule 18 further provides, that the Court may enlarge the time for the return *at* or *before* its *expiration date.* Rule 6 (b) (Civil Procedure) provides that the Court may order the period enlarged if application is made *before* the *expiration* of the period originally prescribed, or as extended by a previous order. Thus, failure by the appellant to take proper action within the forty days

allowed by law, namely, filing his application to proceed in forma pauperis, brings the appellant without the curative or enlargement provisions of the Rules of the Court and no enlargement may be granted by the Court at this late date to docket this cause under the effective Rules of Court, as promulgated and now in existence. As no excusable neglect was shown, this Court may not enlarge or extend the period of time herein and therefore this cause is *not* properly before this Court and should be dismissed."

The Motion to dismiss the appeal *of the Insurance Company* (Case No. 8422) was based upon the fact that it did not take an appeal from the order of the Referee in Bankruptcy but took a separate appeal, under a different case number, from the judgment of the District Court. In petitioner's reply brief, on this Motion to dismiss, was cited and commented on the following decision of this very Circuit Court of Appeals for the Sixth Circuit in which case the rule was declared that a party before the referee, not appealing to the District Court, could not appeal from the District Court's ruling, to said Court. At the time this appeal was attempted, General Order XXVII was effective.

International Agri. Corp. v. Cary, 38 A. B. R. 753, 240 Fed. 101 (C. C. A. Ohio, aff'g s.c. 38 A. B. R. 590, 243 Fed. 475, D. C.):

"General Order in Bankruptcy No. XXVII provides that when a person shall desire a review by the judge of any order made by the referee 'he shall file with the referee, his petition therefor, setting out the order complained of,' whereupon the proceedings shall be certified to the judge; and Rule No. 17 of the District Court below expressly provides that petitions for the review of orders made by the referee shall be filed with that officer 'within ten days from the entry of such order' with authority to the referee 'on written motion and upon good cause shown' to 'allow a longer time, not exceeding, however, five days.' Having failed to take such review, and order in question having been

within the referee's jurisdiction, appellant's right to complain of the order was effectually lost."

And this decision, unmodified, stood as the law at the time this appeal was attempted.

> "The bankrupt filed *no petition to review* the turnover order (General Order XXVII), and it was therefore an adjudication which may not be collaterally attacked that at the time it was made the appellee had possession of and was withholding the property. *There can no longer be any difference of judicial opinion upon the point.* (Citing cases, *inter alia,* 240 Fed. 101)."
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> *Sarks v. Wells* (Jan. 17, 1930) 37 Fed. 2nd, 339, 340 (United States Circuit Court of Appeals, Sixth Circuit).

The foregoing facts are all set forth in the record in this case and are indisputable. Under said facts and the law appertaining thereto, the conclusion must inevitably be drawn that the Circuit Court of Appeals for the Sixth Circuit *never did have jurisdiction* over either of these appeals.

In the opinion handed down in these cases by said Court, all of these contentions were disposed of as follows, to-wit:

> "Appellee insists that the appeal of the insurance company should be dismissed because it *did not seek* a review of the referee's order. We *need not pass* upon the point further than to say that it is *immaterial.* The case *is before us* upon the *appeal of the bankrupt* and this is sufficient for a determination of the controversy."

It seems to us that this language of the court was used under a misapprehension of the facts. The case was *not before said Court* upon the *appeal of the bankrupt,* for the reasons given above.

If the so-called appeal of the bankrupt was void, there could be no right derived therefrom by the Insurance Com-

pany to argue its appeal. If the appeal of the Insurance Company was considered on its own merits, it should have failed under the former decision of this very Circuit Court quoted *supra,* to-wit, *International Agri. Corp. v. Cary.*

> "We cannot accept the conclusion of the (Sixth) Circuit Court of Appeals. It derives from an inadequate appraisal of the record."
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> *Kloeb, Judge, v. Armour & Co.* (Dec. 9, 1940) 311 U. S. 119.

2. ERROR IN FAILING TO SEARCH FOR AND APPLY THE LAW OF OHIO.

In the case of *Erie Railroad Company v. Harry J. Tompkins* (1938), 304 U. S. 64, the Supreme Court of the United States reversed a precedent of almost one hundred years standing and declared that the Federal Courts are bound to follow in their decisions the *case law* of the State in which the action was originally brought.

The case of *Erie Railroad Company vs. Tompkins, supra,* was clarified and *extended* by a recent decision from which we excerpt the following:

> "The United States Circuit Court of Appeals, Sixth Circuit, reversed the decree of the District Court.
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> "The Circuit Court of Appeals held that it was not bound to follow the decision of an intermediate Appellate Court of the state and that it was *free to adopt and apply* what it considered to be *better rule.*
>
> "The opinion of the court was delivered by Mr. Justice Stone and with regard to the applicability of the *Erie Railroad* case, he said:
>
> > 'A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest

> state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much it may have departed from prior decisions of the federal courts. * * * Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that it is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'
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> "The judgment was accordingly *reversed.*"
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> *West v. American Telephone & Telegraph Company* (December 9, 1940) 311 U. S. 223.

In the opinion of the Circuit Court of Appeals for the Sixth Circuit, the court after finding, we claim erroneously, that the case of *Lytle v. Baldinger* (1911) 84 O. S. 1, did not apply to the issue before it, makes this statement: "We are left therefore to *our own view of the law.*" It is to be noted that this is the same statement, in substance, made in *West v. American Telephone and Telegraph Company, supra,* and was the cause of the reversal in that case.

The rule laid down by this Court, for the application of the law of a State to the facts, which rule seems to have been disregarded by the Circuit Court of Appeals for the Sixth Circuit, in the case at bar, is as follows:

> "Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins,* does not present the disputant with duties difficult or strange. The parties and the federal court must now *search for and apply* the entire body of *substantive law* governing an identical action in the *state courts.* Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments

of the state legislature. Now they must merely *broaden their inquiry* to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

John G. Ruhlin, et al., v. New York Life Insurance Company (1938), 304 U. S. 202.

3. ERROR IN HOLDING THAT THE BENEFICIARIES NAMED IN THE POLICIES WERE NECESSARY PARTIES IN THIS PROCEEDING.

The Circuit Court of Appeals for the Sixth Circuit used the following language in its opinion; 117 Fed. 2nd 582:

"The *beneficiaries* were not made parties defendant to the petition although it is clear enough that they had a *vital interest* adverse to the claim of the trustee and should have been made parties defendant."

The *law of Ohio,* on this point, is as follows:

"The right of a beneficiary in a contract of insurance which reserves to the insured the right to change the beneficiary from time to time, and which may be defeated by the insured by the designation of another beneficiary, or by nonpayment of dues, *does not become vested* until the happening of the event which matures the policy."

Oetting, Guardian, vs. Sparks (1933) 109 O. S. 94.

"A life insurance policy, which reserves to the insured the privilege of changing the beneficiary therein, gives the named beneficiary *only an expectancy* during the life of the insured, which does not become a vested right until the insured's death. (*Oetting, Gdn. v. Sparks,* 109 Ohio St., 94, second proposition of syllabus, approved and followed.)

"A majority of the cases hold that if a life insurance policy reserves to the insured the right to change the beneficiary, the beneficiary first designated *does*

not take a vested interest, but has *only an expectancy* during the life of the insured, contingent upon being the beneficiary at the time of the insured's death. 7 *Cooley's Briefs on Insurance* (2 Ed.), 6406; 2 *Couch, Cyclopedia of Insurance Law,* 825; 14 *Ruling Case Law,* 1376; 37 *Corpus Juris,* 579. *This is the rule adopted in Ohio. Oetting, Gd., v. Sparks,* 109 Ohio St., 94, 143 N. E. 184."

Katz v. Ohio National Bank, Exr. (1934) 127 O. S. 531, 533.

These two above cited decisions are the law of Ohio and the said Circuit Court was bound by the declaration thereunder, but apparently these decisions of the Supreme Court of Ohio were not given any consideration by said Court in its opinion.

The holding of the Circuit Court of Appeals for the Sixth Circuit on this point was made in entire disregard of the mandates of this Court in *Erie Railroad v. Tompkins, supra, Ruhlin vs. New York Life Insurance Co., supra,* and *West v. American Telegraph Co., supra.*

4. ERROR IN CHANGING BY INTERPRETATION THE WORDS "PAID IN FRAUD OF CREDITORS," TO "PAID WITH INTENT TO DELAY, HINDER AND DEFRAUD THEM."

The *courts of Ohio* have held in a line of cases, some of which are quoted and cited herein, constituting an unbroken current of authority extending over a great period of years, that a gift by an insolvent is *"constructively fraudulent"* as to his creditors. This is on the principle that a man must be just before he can be generous.

The serious result of this non-application of Ohio law is shown in the following excerpts from the opinion handed down by the United States Circuit Court of Appeals for the Sixth Circuit in this case, viz:

"The referee and the court based the order upon the view that the payment of premiums by the insured while insolvent was '*in fraud of creditors*' under Ohio General Code, Sec. 9394.

"We think its meaning is that creditors have a remedy where premiums have been paid *with intent* to delay, hinder and defraud them and that the *question of intent* is one of *ultimate fact* to be determined upon a consideration of the attending *facts and circumstances,* such as the question of the insolvency of the insured, his attitude toward his debts, the amounts thereof, his prospective ability to liquidate them, whether the policy was issued before or after insolvency, its cash surrender value; and finally, whether after all he, in good faith, intended to provide by moderate premiums some protection to those who had a natural claim upon his bounty."

The Circuit Court of Appeals for the Sixth Circuit, in its opinion, disposes of the Ohio Supreme Court decision in *Lytle v. Baldinger* (1911) 84 O. S. 1, a decision which was relied upon by both of the lower tribunals in this case, in the following language, to-wit:

"The case of *Lytle v. Baldinger,* 84 Ohio State 1, is cited as the nearest approach to an interpretation of the statute by an Ohio court but neither the present issues nor the statute were involved in the *Lytle* case. Nothing said in the *Lytle* case can be construed as an interpretation of the language 'in fraud of creditors.'

"*We are left* therefore *to our own view of the law.*"

We quote the following language from the opinion of the Supreme Court of Ohio in *Lytle v. Baldinger, supra,* construing the words "in fraud creditors" in Ohio General Code, Section 9394, to-wit:

"It would seem to be the policy of the law, not only to permit, but to encourage every husband to provide by insurance upon his life for the maintenance and support of his widow and children after his death. At the same time the law protects his creditors to the

extent of the funds actually diverted from his estate by reason of the procuring and keeping in effect such insurance. It would not appear that the creditor could be injured, delayed or defrauded *beyond the amount of money actually* expended *in the purchase of this insurance.* A debtor is under no legal obligation to insure his life for the benefit of his creditors. All that the law requires of him is that the property and means of which he is possessed, saving and excepting certain property exempt by law from execution, shall be honestly applied to the payment of his debts, and he is *not permitted* to give away that which in justice *belongs to his creditors.* So that when the law provides for the *return to his estate* of the money used *in the purchase of this insurance,* it gives to the creditor everything he is entitled to have, or could have reached by any process of law."

In *Lytle v. Baldinger, supra,* the policies had become vested in the wife and children by the death of the insured.

Syll.

"Where one, having creditors, transfers or conveys property representing virtually his entire estate, within three months prior to the filing of his petition in bankruptcy, for an appreciably inadequate consideration, an intent on his part to hinder, delay or defraud his creditors is thereby established within the provisions of Section 67e of the National Bankruptcy Act, Title 11, Section 107 (e), U. S. Code, and his trustee in bankruptcy is entitled to an avoidance of the transfer or conveyance."

Marlow, Trustee, Appellant v. Gillen, Appellee, 132 O. S. (1936) 102.

"If a man gives away his property without providing for his creditors, it is constructively fraudulent."

Union Central Life Insurance Co. v. Eckert (1878) 5 Ohio Decisions, Reprint, 452, 528.

5. ERROR IN FINDING AS TO "CASH SURRENDER VALUE" OF POLICY.

In the opinion of the Circuit Court of Appeals for the Sixth Circuit, we find this language, to-wit:

> "Moreover, the premiums to be returned to the trustee are to be paid by the insurance company out of the *cash surrender value* of the policy. We think that this was likewise erroneous. The statute is plain. The trustee can be paid only 'out of the proceeds of the contracts.' The contract is the policy and by its terms it can have no 'proceeds' until it matures, either by the death of the insured or as an endowment. It has not matured. The bankruptcy did not mature it. The statute does not undertake thus to rewrite the policy."

The above quoted language, in itself, is quite sufficient to show that the judge who wrote the opinion did not understand the facts, nor the claims made by the Trustee, nor the orders made by the lower tribunals.

No claim was made by any one that the policy had matured; nothing was claimed nor ordered paid out of the *cash surrender value* of the property; no claim was made by the Trustee, nor any payment ordered by the lower tribunals, out of the *"proceeds"* of the policy. The opinions of the Referee in Bankruptcy (Record, p. 24) and of the District Court (Record, p. 29), show that the Circuit Court of Appeals for the Sixth Circuit rendered its opinion without accurate knowledge as to what the claims of the Trustee herein actually were.

The claim of the Trustee was that certain sums were in the hands of the Insurance Company representing premiums, dividends and interest; that the bankrupt had *power*, by a change of beneficiary to make himself the beneficiary; and by the terms of the policy itself, the right to exercise all privileges of ownership in said policy. The claim of the Trustee is and was that the *powers* of the bankrupt passed to the Trustee by operation of law.

6. ERROR IN HOLDING "THAT THE PREMIUMS, ACCUMULATING DIVIDENDS AND INTEREST SHOULD NOT GO TO THE TRUSTEE."

On the face of the policy as issued, said policy being part of the record in this case (Record, pp. 7 *et seq.*), appears the following language, to-wit:

> "The right to *change the beneficiary* is reserved by the insured."
>
> "IV. CHANGE OF BENEFICIARY. Whenever the right to *change the beneficiary* has been reserved in the last designation of beneficiary recorded at the Home Office of the Company, the insured, * * * shall be entitled, *without* the *consent* of the *beneficiary*, to any cash dividends declared on this Policy and to the loan or cash value herein provided for, and *shall have full power* while this Policy is in force to *designate* a *new* beneficiary, with or without reserving the right of future designation, * * *."

And in the certificate (Record, pp. 7 *et seq.*) as to the last change of beneficiary is this language, to-wit:

> "Prior to maturity the right to make further *changes of beneficiary* or assignments, to surrender or borrow upon the policy, and to exercise all privileges of *ownership* shall be *vested* only in the *insured.*"

Bankruptcy Act, Par. 70, 11 U. S. C. A. 110, contains the following language, under the Amendatory Act of 1938, and which language, so far as quoted here, is identical with the language of the former act, to-wit:

> "The trustee of the estate of a bankrupt * * * shall be vested by operation of law with the title of the bankrupt, as of the date of the filing of the petition (old act said "date of adjudication") * * * to all * * * (3) *powers* which he might have exercised *for his own benefit*, but not those which he might have exercised solely for the benefit of some other person."
>
> "This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Authority of the United States, shall be the *supreme Law of the Land.*"

United States Constitution, Article VI.

"A policy of insurance held by a bankrupt, which has a cash surrender value at the time of the adjudication, *becomes an asset,* to the extent of such value, in the trustee, under 70-a of the Bankruptcy Act, even when the policy is payable to a beneficiary other than the bankrupt, his estate or personal representatives, if the bankrupt has reserved *absolute power to change the beneficiary* (237 Fed. 796 reversed).

"The question in the case is the simple one of the construction of Section 70-A.

"The declaration of subdivision 3 is about '*powers* which he might have exercised for his own benefit' 'shall in turn be vested in' the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true that the policies in question here are *not so payable,* but they *can or could have been* so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets, and, it might be, a *refuge for fraud.*"

Cohen, Trustee in Bankruptcy of Samuels v. Samuels (1917), 245 U. S. 50.

The case of *Cohen, Trustee v. Samuels, supra,* conclusively supports the claims of the trustee in the case at bar; is a decision of this Court, and under the doctrine of judicial subordination, was binding upon the Circuit Court of Appeals for the Sixth Circuit. Yet the said Circuit Court was content to dispose of the case at bar with the statement "We are left therefore to *our own view of the law.*"

And what authority does the Circuit Court of Appeals cite in support of its opinion? We quote from the opinion as published in 117 Fed. 2nd 582, 584.

> "See *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370; *Ross v. Minn. Mut. L. Ins. Co.*, 154 Minn. 186, 191 N. W. 428, 31 A. L. R. 46.
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> "This view accords with the weight of authority (see Annotations under the *Ross* case, 31 A. L. R. 52); and *we are satisfied with it*. There is no evidence to indicate *any actual intention* upon the part of the insured to defraud his creditors by keeping up the payments of the premiums upon the policy even after he was insolvent."
>
> "Thus far in our history four Federal Bankruptcy laws have been passed. The law of 1800 was repealed in 1803. That of 1841 was repealed in 1843. That of 1867 was repealed in 1878. (*Central Bank of Washington v. Hume, supra*, was decided in 1888.) That of 1898 is still in force."
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> *Black, Constitutional Law*, 3rd Ed. 261.

It is interesting to note that the learned court cites as its principal authority on a question in bankruptcy law, a case decided during the years when no federal bankruptcy act was in existence.

In *Bank v. Hume, supra*, the policy was a *straight life policy*; the action was by a creditor of the husband, to recover back premiums alleged to have been paid in fraud of creditors. The action was brought *after* the death of the husband, in the policy *no right* to *change* the *beneficiary was reserved* and there was no federal bankruptcy law in existence.

The case of *Bank v. Hume, supra*, therefore differs in *every material point*, from the case at bar. How the learned court came to regard that case as controlling, in the case at bar here, passeth all understanding.

"It is a general rule that a life insurance policy, and the money to become due under it, belong the moment it is issued to the person named in it as beneficiary, and that there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named.

"A married man may rightfully devote a moderate portion of his earnings to insure his life, and thus make a reasonable provision for his family after his decease, without being thereby held to intend to hinder, delay or defraud his creditors, provided no such fraudulent intent is shown to exist, or must necessarily be inferred from the surrounding circumstances.

"In order to maintain an action on behalf of creditors of a deceased person against a life insurance company, to recover back premiums alleged to have been fraudulently paid by the decedent while insolvent to the company in order to make provisions for his wife and children, it must be alleged and proved that the company participated in the fraud."

Washington Central Bank v. Hume (1888) 128 U. S. 195.

"Under Bankruptcy Act July 1, 1898, C. 540, Par. 70a (5), 30 Stat. 505 (U. S. Comp. St. 1901, p. 3451) which provides that a trustee in bankruptcy shall be vested with the title of the bankrupt to all property which he could 'by any means have transferred' provided that, when any bankrupt shall have any insurance policy which shall have a cash surrender value payable to himself or his estate, he may pay such surrender value and retain the policy, the proviso does not limit and define what insurance policies shall pass to the trustee, but only excepts from property, which would otherwise pass to the trustee, insurance policies which have a surrender value, on payment to the trustee of such value. A policy which authorized the bankrupt to nominate or *change the beneficiary* at will is property which he might have 'transferred' and as such *passes under such section to his trustee,* unless

brought within the exception made by the proviso, although it is in terms payable to a designated beneficiary.

"Of the case of *Central North Bank v. Hume*, 128 U. S. 195, it is enough to say that the policies there in question *did not empower* the insured *to change the beneficiary*, but contained provisions *to the contrary*, as is shown by the statement preceding the opinion, which reads: 'It is a general rule that a life insurance policy and the money to become due under it, belong the moment it is issued to the person named in it as beneficiary, and that there is *no power* in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named.' "

In re Orear (1910), 178 Fed. 638 (C. C. of A. Eighth Circuit (Mo.)).

Here appears a *clear conflict* between the decisions of two Circuit Courts of Appeals, the Sixth Circuit and the Eighth Circuit.

The case of *Ross vs. Minnesota Life Insurance* (1923) 154 Minn. 186, the other case relied on by the Circuit Court of Appeals for the Sixth Circuit to support its opinion, is substantially on the same state of facts as *Bank v. Hume, supra*, as is shown by the following excerpt from the *Ross* case:

This case involved a *straight life policy*. The premiums were paid by the insured while *insolvent*. On one policy, $696 had been paid as premium, and on the other $240.

The *insured died* and creditors claimed the premiums under this statute—to-wit:

"Whenever any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the person effecting the same. All premiums paid for insurance in fraud of creditors, with interest thereon,

shall inure to their benefit from the proceeds of the policy, if the company be specifically notified thereof in writing before payment.

Held. To maintain an action on behalf of the creditors of a deceased husband, to recover premiums paid by him while insolvent in order to provide for his family after his death, *fraud* must not only be *alleged* but *proved.*"

Ross v. Minnesota Mutual Life Ins. Co. (Jan. 5, 1923), 154 Minn. 186.

We respectfully suggest to this Court that the case of *Ross vs. Minnesota Life Insurance Co., supra,* no more supports the decision of the Circuit Court of Appeals for the Sixth Circuit than does the case of *Bank v. Hume, supra.*

The Circuit Court of Appeals for the Sixth Circuit, in support of its opinion, also cites 31 *A. L. R.* 51, 52. Annotation.

There is not a single Ohio case cited in that part of the annotation on which the court relied.

In fairness the court could further have commented on the *entire annotation,* particularly on page 55, where it is stated:

"There are a number of decisions which support the doctrine that the payment of premiums by an insolvent husband on his own life, for the benefit of his wife and children, or other relatives, *is fraudulent* as to his creditors, even in the *absence of actual fraudulent intent* on his part."

An *Ohio decision* is cited in support of the above paragraph in the annotation, from which *Ohio decision we excerpt the following*:

"A gift or payment of money as a premium for insurance on his life by a husband for the benefit of his wife, when in fact he is indebted beyond his means of payment, is constructively fraudulent as against creditors, under the 30th section of the act of 1872, the same as it would be under the statute of frauds."

Excerpt from the statute being construed is as follows:

"and a policy of insurance on the life of any person duly assigned, transferred or made payable to any married woman, whether such transfer, using the word transfer, be by her husband or other person, shall inure to her separate use and benefit and that of her children, independently of her husband's or their creditors, or of the person effecting or transferring the same, or his creditors. * * * provided, that if such policies are procured by any person *with intent to defraud* his creditors, an amount equal to the premiums paid on such policy or policies, with interest, shall inure to the benefit of such creditors, subject, however, to the statute of limitation.

It is *claimed here* that the policy must have been actually procured with the *intention of fraud.* That, on principles of law, I do not think is the case. The old statute of Elizabeth, providing for the setting aside of fraudulent conveyances, specifies those conveyances that are made with intent and purpose. It would seem that that would cover nothing but actual fraud. But the English Courts now hold that that covers *constructive fraud.* The same principle is determined in the case of *Jamison v. McNally,* 21 Ohio State Reports, where, under our assignment law, the making of a conveyance, if it is done with intent to defraud creditors, is declared fraudulent, yet if a man *gives away* his property without providing for his creditors, it is *constructively fraudulent.*"

Union Central Life Insurance Co. v. Eckert (1878), 5 O. D. Rep. 452 (Sup. Ct. of Cincinnati) (528).

This decision has never been modified or overruled in *any subsequent Ohio case.*

Thus it can be seen quite plainly that *the opinion* of the Circuit Court of Appeals for the Sixth Circuit is *not supported* by any of the authorities which *it cites itself.*

7. ERROR IN NOT APPLYING THE EXEMPTION LAWS OF OHIO.

CHAPTER III, Sec. 6. This Act shall not affect the allowance to bankrupts of the *exemptions* which are prescribed by the laws of the United States *or by the State laws* in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, * * *.

Federal Bankruptcy Act, 1938 Edition.

From the opinion of the Circuit Court of Appeals for the Sixth Circuit, we quote:

"We are left therefore to *our own view of the law* and it must be kept in mind that we are dealing with an *exemption statute* which is entitled to a construction *liberal to the debtor.*"

The law of Ohio, as to the *exemption of money* from claims of creditors, is as follows:

Ohio General Code 11738.

"Property Exempt from Levy. Husband and wife living together * * * and not the owner of a homestead, in lieu thereof, may hold exempt * * * real or personal property * * * *not exceeding five hundred dollars* in value, in addition to the amount of chattel property otherwise by law exempted. Such *selection* and *exemption shall not be made by the debtor,* or his attorney, or allowed to him from *money,* salary or wages *due to him* from any person, partnership or *corporation.* * * * (111 v. 383; R. S. #5441. Eff. July 21, 1925.)"

"The sole question presented in each of these cases is whether the fund involved falls within the provision of Section 11738, General Code, which precludes the allowance of exemption in lieu of homestead out of certain property therein specified.

"It is *contended on the one hand* that in the provision 'such selection and exemption shall not be made * * * from money, salary or wages due to him,' the phrase 'salary or wages' modifies or qualifies 'money,'

and that therefore money due the judgment debtor from any source, or of any character or class *other than 'salary or wages,'* and within the amount stated, may be held as exempt in lieu of homestead; or, to put it the other way, that 'salary or wages,' that is, personal earnings, due the judgment debtor, *is the only 'money'* due him which he may not select as exempt in lieu of homestead.

"The *other contention* is that the language employed *cannot be so construed* as to limit 'money due' to 'salary or wages,' and exclude money due the judgment debtor *from other sources* or other persons.

"In our opinion *the latter view is correct,* and is required by the simple and plain language of the statute, and that conclusion is supported by a review of the *legislative history* of this section and a consideration thereof in connection with Section 11725, General Code.

"In our opinion any test that may be applied requires that the phrase employed in Section 11738, General Code, be held to include *not only money due* the judgment debtor, as salary or wages, but money due him *from any* source."

The Morris Plan Bank vs. Viona, et al. (1930) 122 O. S. 28.

The Circuit Court of Appeals for the Sixth Circuit took *"its own view of the law."* It certainly did so in *entire disregard* of the mandates of this Court in *Erie Railroad v. Tompkins, supra*; *Ruhlin v. New York Life Insurance Co., supra*; and *West v. American Telegraph Co., supra.*

8. ERROR IN HOLDING THAT THE LAST PREMIUM PAYMENT TO THE INSURANCE COMPANY WAS THE PROPERTY OF THE BANKRUPT.

The record shows that the last payment of premium made to the Insurance Company of $113.35, was made June 8, 1937, and that the adjudication was on September 3, 1937.

"A person is insolvent when the present fair saleable value of his property is less than the amount required

to pay his debts." Bankruptcy Act, Sec. 67 (d) (1) (d).

"All conveyances, transfers, assignments * * * made or given by a person adjudged a bankrupt * * * within *four months* prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors * * * shall be *null and void* as against the creditors of such debtor * * * and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Bankruptcy Act 67 (e).

This payment was made to the Insurance Company during the admitted insolvency of the bankrupt, and during the *four month period* prior to bankruptcy, and therefore, under the Ohio rule, was constructively fraudulent.

Further, all of the moneys in question here *could be drawn,* under the terms of the policy by the bankrupt at any time prior to the adjudication, thus making the insurance policy a *"refuge for fraud,"* such as was condemned by this Court in *Cohen vs. Samuels, supra.*

At the time of this adjudication, the amendment of 1910 to the Bankruptcy Act Sec. 47 (a) (2), U. S. C. A. Title ii, Sec. 75, was effective. This section endows the trustee with the rights and remedies of a creditor *"armed with process." Remington,* Vol. 4, Sec. 1547.

The Circuit Court of Appeals for the Sixth Circuit has heretofore recognized the effect of the change made by the amendment in the following decision:

Potter Mfg. Co. v. Arthur, 220 Fed. 843, 34 A. B. R. 75 (C. C. A. Ohio):

"3. Under the rule of *York v. Cassell,* 15 A. B. R. 633, 201 U. S. 344, 50 L. ed. 782, 26 S. Ct. 481, *supra,* this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This *rule has been changed* by the amendment of June 25, 1910, to section 47a (2), U. S. C. title 11, § 75, providing that as to property 'in custody,' the trustee 'shall be

> deemed vested with all rights, remedies and *powers* of a creditor's *holding a lien* by legal or equitable proceedings'; and of course the nature and extent of these 'rights, remedies and powers' must be determined by the law of the State, where not inconsistent with the Bankruptcy Act."

In this case, the Trustee had a *lien upon all* of the money in the hands of the insurance company which the Bankrupt could himself draw; none of the said funds could be held exempt under the laws of Ohio, as shown *supra*. And still, under the decision of the Circuit Court of Appeals for the Sixth Circuit, the bankrupt can draw the funds in question and use them as he pleases, thus indeed making the insurance policy a refuge for fraud.

CONCLUSION.

We have endeavored to demonstrate, in the foregoing pages, that the Circuit Court of Appeals for the Sixth Circuit, in its opinion disposing of this case—

1. Has acted without having had jurisdiction over these appeals.
2. That said opinion is in conflict with a decision of the Eighth Circuit Court of Appeals on the same matter.
3. That said opinion is in conflict with decisions of Ohio courts on the same matter.
4. That said opinion is in conflict with a decision of this Court on some phases of this matter.
5. That this Court has not decided this question covering generally this field of law, and your opinion ought to be available to guide the administration of Estates in Bankruptcy Courts and in furtherance of orderly management and prompt disposition of Estate matters.

Your petitioner therefore respectfully urges that the prayer of its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in

the instant cases be granted, and that petitioner may have the relief prayed for in said petition.

All of which is respectfully submitted.

SUGGS GARBER,

THEODORE E. SPILKA,

Attorneys for Petitioner.

HOWARD D. BURNETT,

Of Counsel.